



[TRANSLATION]

Citation: *AB v Canada Employment Insurance Commission*, 2022 SST 1508

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

## Decision

**Appellant:** A. B.  
**Representative:** Jean-Christian Blais

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (460241) dated April 26, 2022 (issued by Service Canada)

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**Tribunal member:** Normand Morin

**Type of hearing:** Videoconference  
**Hearing date:** October 26, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** December 2, 2022  
**File number:** GE-22-1705

## Decision

[1] The appeal is allowed. I find that the Appellant didn't lose his job because of misconduct.<sup>1</sup> This means that his disqualification from receiving Employment Insurance (EI) regular benefits from October 31, 2021, isn't justified.

## Overview

[2] From 2018 to October 29, 2021, inclusive, the Appellant worked as a heavy truck and construction equipment driver and operator (snow removal truck driver) as well as a road worker for X (X or employer). He stopped working for that employer because it let him go. The employer says that it let him go because his driver's licence was revoked, so he was unable to perform his duties as a heavy truck and construction equipment driver and operator.

[3] On February 10, 2022, the Canada Employment Insurance Commission (Commission) told the Appellant that he wasn't entitled to EI benefits from October 31, 2021, because he had lost his employment with the employer on October 29, 2021, as a result of his misconduct.<sup>2</sup>

[4] On April 26, 2022, after a request for reconsideration, the Commission told him that it was upholding the February 10, 2022, decision that he had lost his job because of misconduct.<sup>3</sup>

[5] The Appellant says that he didn't lose his job because of misconduct. He explains that he lost his driver's licence after being diagnosed with alcohol use disorder. He says that he was later permitted to have a driver's licence with Condition I, which allowed him to drive a vehicle equipped with an alcohol ignition interlock device—a device that prevents the vehicle from starting if it detects alcohol on the driver's breath. He says that he was never charged with driving a road vehicle while impaired by alcohol and that he didn't commit any reprehensible act that led to the suspension of his driver's

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<sup>1</sup> See sections 29 and 30 of the *Employment Insurance Act (Act)*.

<sup>2</sup> See GD3-26 and GD3-27.

<sup>3</sup> See GD2-9, GD3-33, and GD3-34.

licence. He argues that he never wilfully or deliberately acted recklessly to lose his driver's licence and, as a result, his job. On May 16, 2022, he challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

## Issues

[6] I have to decide whether the Appellant lost his job because of misconduct.<sup>4</sup> To decide this, I have to answer the following questions:

- Why did the Appellant lose his job?
- Is the reason for the Appellant's dismissal misconduct under the Act?

## Analysis

[7] The Act doesn't define the term "misconduct." Decisions by the Federal Court of Appeal (Court) describe the concept of misconduct.

[8] In one of its decisions, the Court said that, to be misconduct, "the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."<sup>5</sup>

[9] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless as to "approach wilfulness," meaning that it is almost wilful.<sup>7</sup> For their behaviour to be misconduct under the Act, the claimant doesn't have to have wrongful intent; in other words, they don't have to mean to be doing something wrong.<sup>8</sup>

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<sup>4</sup> See sections 29 and 30 of the Act.

<sup>5</sup> The Court established this principle in *Tucker*, A-381-85.

<sup>6</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>7</sup> The Court established this principle in *McKay-Eden*, A-402-96.

<sup>8</sup> The Court established this principle in *Secours*, A-352-94.

[10] There is misconduct if the claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being let go because of that.<sup>9</sup>

[11] To determine whether the misconduct can result in dismissal, there has to be a link between the claimant's misconduct and the loss of their job. So, the misconduct has to be a breach of an express or implied duty resulting from the contract of employment.<sup>10</sup>

[12] The Commission has to prove that the claimant lost their job because of misconduct. The Commission has to prove this on a balance of probabilities.<sup>11</sup> This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.<sup>12</sup>

### **Issue 1: Why did the Appellant lose his job?**

[13] In a letter to the Appellant ([translation] "RE: Notice of termination") dated October 26, 2021, the employer told him that his name would be removed from the recall list for the position of heavy truck and construction equipment driver and operator on November 1, 2021, in accordance with article 11-49.17 of the collective agreement. The employer said that he needed a valid driver's licence to perform his duties as a driver. The employer said that because his licence was revoked, he was unable to perform his duties.<sup>13</sup>

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<sup>9</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>10</sup> The Court established this principle in *Lemire*, 2010 FCA 314.

<sup>11</sup> The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

<sup>12</sup> The Court established this principle in *Bartone*, A-369-88.

<sup>13</sup> See GD2-11 or GD3-22.

[14] The employer's statements to the Commission also provide the following information:

- a) The Appellant was let go from his position as a heavy truck and construction equipment driver and operator because he lost his driver's licence.
- b) The Appellant had two different positions, depending on the season: heavy truck and construction equipment driver and operator, and road worker. From April to October, he worked as a road worker. The rest of the year, he worked as a heavy truck and construction equipment driver and operator.
- c) In the summer, that is, from April to October, the employer found an accommodation to keep the Appellant on by pairing him with another employee, so he didn't have to drive a vehicle.
- d) But, from November 1, 2021, the employer wasn't able to accommodate him, since he needed a valid driver's licence to do his job.
- e) After the Appellant's driver's licence was revoked, the employer could not preserve the employment relationship.
- f) The Appellant was still on a recall list to work as a road worker.
- g) Once he got his driver's licence back, the Appellant could be put on the recall list for winter work (November to March), but he would not have the same conditions and benefits as before he was let go.<sup>14</sup>

[15] The Appellant, meanwhile, argues that he didn't commit any reprehensible act related to his drinking and was never charged with driving a road vehicle while impaired. He says that on March 1, 2021, after he was diagnosed with alcohol use disorder, the Société de l'assurance automobile du Québec [Quebec's automobile insurance corporation] (SAAQ) told him that it was suspending his driver's licence effective

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<sup>14</sup> See GD3-21.

March 21, 2021.<sup>15</sup> He says that on March 15, 2021, the SAAQ permitted him to get a driver's licence with Condition I on or after March 21, 2021, so that he could drive a vehicle equipped with an alcohol ignition interlock device.<sup>16</sup> He says that he has since gotten his driver's licence back without Condition I.

[16] I find that the Appellant lost his job because his driver's licence was suspended and he could no longer perform his duties as a heavy truck and construction equipment driver and operator.

[17] Now, I have to decide whether the act attributed to the Appellant amounts to misconduct under the Act.

## **Issue 2: Is the reason for the Appellant's dismissal misconduct under the Act?**

[18] I find that the Appellant didn't act to deliberately lose his job. The evidence on file doesn't show that he committed acts that amount to misconduct under the Act.

[19] In his case, based on the evidence, even though the Appellant lost his driver's licence, it wasn't because of an act that amounts to misconduct under the Act.

[20] I find the Appellant's testimony credible and place the most weight on it. The Appellant painted a detailed picture of the circumstances that led to the termination of his employment as a heavy truck and construction equipment driver and operator on October 26, 2021. He didn't contradict himself. He explained in detail why his driver's licence was suspended and what he did to get it back, with the support of his family doctor. A number of documents support his testimony on this point.

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<sup>15</sup> See GD2-12 and GD2-13.

<sup>16</sup> See GD3-16.

[21] The Appellant says that he didn't lose his job because of misconduct, for the following reasons:

- a) He started working as a road worker for the employer in 2014. In 2018, he got a job as a heavy truck and construction equipment driver and operator (snow removal truck driver) in addition to his job as a road worker. He alternated between working as a road worker in the summer (for example, from May to late October) and working as a heavy truck and construction equipment driver and operator in the winter (for example, from late October to late April). Given the suspension of his driver's licence in March 2021, he wasn't able to work as a heavy truck and construction equipment driver and operator from late October 2021, since it wasn't possible to equip the vehicle he had to drive with an alcohol ignition interlock device. He worked as a road worker from early May 2021 to late October 2021 and from late April 2022 to late October 2022.<sup>17</sup>
- b) In 2020, he faced several personal and professional struggles (for example, his father's death in late December 2019, problems with his ex-partner concerning the custody of their children, difficulties due to having to work overtime and night shifts, sleep problems, and problems restoring or maintaining balance in his life).
- c) On January 7, 2021, after returning from vacation, he met with the employer (chief of operations). During this meeting, the employer, among other things, asked him about his drinking and whether he had a drinking problem. He replied that he sometimes drank more than he intended but that this happened outside his shifts. The employer offered him help, and he accepted. He told the employer that he had approached X, a support organization for men, and that he could use the employee assistance program (EAP). The

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<sup>17</sup> See GD3-17 to GD3-20, GD3-23, and GD3-24.

employer also suggested that he talk to his family doctor and tell her about all the drinking problems he may have.<sup>18</sup>

- d) Around January 11, 2021, he saw his family doctor. His doctor suggested that he go on medical leave for about a month and a half or two months and go back to work in March 2021.<sup>19</sup> He says that his doctor diagnosed him with alcohol use disorder, adjustment disorder, and mood disorder and recommended that he talk to a social worker. He met with a social worker, who referred him to the X addiction rehabilitation centre (X or X) [in] X or X addiction rehabilitation centre (X), where he began treatment in February 2021. The treatment lasted about five months.<sup>20</sup> He also attended a number of meetings with X.
- e) He also saw his family doctor every other week.<sup>21</sup> After a few meetings, she told him that she had to submit a report to the SAAQ about the change in his health status and asked him to sign it. His driver's licence was suspended as a result of this report by his doctor. He didn't think that signing this document would have consequences for his driver's licence and for his job, since he had been proactive and had acted in good faith in the process of getting help, given his alcohol use disorder.<sup>22</sup>
- f) The SAAQ sent him a letter ([translation] "Re: Suspension of your driver's licence"), dated March 1, 2021, saying that it was suspending his driver's licence effective March 21, 2021, after analyzing the medical examination reports that had been sent to it or the medical information it had received about him. The document indicates that to get his driver's licence back, he needed to meet one of the following requirements: undergo a comprehensive assessment by an SAAQ partner and meet the goals of the supervision plan

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<sup>18</sup> See GD2-14, GD3-31, and GD3-32.

<sup>19</sup> See GD2-14, GD3-23, and GD3-24.

<sup>20</sup> See GD3-31 and GD3-32.

<sup>21</sup> See GD2-14.

<sup>22</sup> See GD3-23 to GD3-25.



that would be developed for him, or provide proof from his doctor that he had been in remission for at least 12 months.<sup>23</sup>

- g) He says that he was very surprised and disappointed to receive this letter. He was under the impression that he had taken all the necessary steps after talking with the employer and that a date had been set for his return to work. The suspension also surprised his family doctor. He says that she helped him challenge the SAAQ's March 1, 2021, decision, as shown by her March 9, 2021, letter to the SAAQ.<sup>24</sup> Another doctor helped him challenge the decision, as shown by the March 15, 2021, letter to the SAAQ from this doctor.<sup>25</sup>
- h) The Appellant then received a letter from the SAAQ, dated March 15, 2021, permitting him to get a driver's licence with Condition I on or after March 21, 2021.<sup>26</sup>
- i) The SAAQ sent him another letter ([translation] "Re: Response to your application for review concerning your driver's licence"), dated April 1, 2021, saying that it was maintaining its decision to suspend his driver's licence in accordance with section 29 of the *Regulation respecting the health of drivers* and section 191 of the *Highway Safety Code*. In the letter, the SAAQ reminded him of the two options it had mentioned in its March 1, 2021, letter, to get his driver's licence back.<sup>27</sup>
- j) The SAAQ gave him two options to get his driver's licence back: provide a letter from his attending physician confirming one year of sobriety or participate in a specialized program.<sup>28</sup>

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<sup>23</sup> See GD2-12 and GD2-13.

<sup>24</sup> See GD2-14.

<sup>25</sup> See GD2-15.

<sup>26</sup> See GD3-16.

<sup>27</sup> See GD3-17.

<sup>28</sup> See GD3-25.

- k) After receiving the SAAQ's April 1, 2021, letter, he registered for the Program to Assess and Reduce the Risk of Impaired Driving (PERRCCA). Despite once describing it as a one-year program,<sup>29</sup> he says that it is a six-month program.<sup>30</sup>
- l) The SAAQ sent him another letter ([translation] "Re: Licence with Condition I"), dated April 14, 2021, reiterating that it was permitting him to get a driver's licence with Condition I."<sup>31</sup>
- m) In late June 2021 and mid-July 2021, after drinking and waiting until the next day—both times—to take the test on his alcohol ignition interlock device, he failed the test.<sup>32</sup>
- n) On April 25, 2022, he told the Commission that he had to go through the whole sobriety process again to get his driver's licence back, since it was revoked for 12 months as of July 2021.<sup>33</sup>
- o) The employer sent him a letter ([translation] "RE: Notice of termination"), dated October 26, 2021, telling him that his name would be removed from the recall list for the position of heavy truck and construction equipment driver and operator on November 1, 2021, because his driver's licence was revoked.<sup>34</sup> In November 2021, the employer wasn't able to accommodate him by equipping the vehicle he drove with an alcohol ignition interlock device.<sup>35</sup>
- p) In April 2022, he was recalled to work, as shown by the employer's letter to him dated March 7, 2022 ([translation] "Re: Recall").<sup>36</sup> He worked the entire summer of 2022 (late April 2022 to October 2022).

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<sup>29</sup> See GD3-25.

<sup>30</sup> See GD3-19, GD3-20, GD3-31, and GD3-32.

<sup>31</sup> See GD2-18.

<sup>32</sup> See GD3-31 and GD3-32.

<sup>33</sup> See GD3-31 and GD3-32.

<sup>34</sup> See GD2-11.

<sup>35</sup> See GD3-23 and GD3-24.

<sup>36</sup> See GD2-10.

- q) He is waiting to be recalled to the position of heavy truck and construction equipment driver and operator, since his driver's licence no longer bears Condition I.
- r) He argues that he was acting proactively in seeking help with his drinking but that this hurt him almost as much as if he had been arrested for alcohol-impaired driving.

[22] The Appellant's representative argues as follows:

- a) Several Court decisions that the Commission refers to in its arguments show that it is misconduct under the Act when someone has drug or alcohol use disorder and is let go because of their behaviour (for example, absences from work due to drinking, reprehensible behaviour by an employee because they drank or took drugs on the job or because they were intoxicated for this reason, an employee's refusal to get help with a drinking problem).<sup>37</sup>
- b) The representative argues that a finding of misconduct requires reprehensible behaviour related to the loss of the driver's licence, whereas the Commission is of the view that losing a driver's licence is automatically misconduct. The Commission uses principles but makes no distinction with the Appellant's case, which involves a disease rather than reprehensible behaviour on his part. As a result, his case is distinguishable from those described in several of the Court decisions that the Commission refers to in its arguments.<sup>38</sup>
- c) The Appellant has a disease or disability, specifically alcohol use disorder, possibly linked to other external factors (for example, mourning his father, problems with his ex-partner, sleep problems).

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<sup>37</sup> See the following Court decisions: *Mishibinijima*, 2007 FCA 36; *Pearson*, 2006 FCA 199; *Wasylska*, 2004 FCA 219; *Cooper*, 2003 FCA 389; *Marion*, 2002 FCA 185; and *Tucker*, A-381-85—GD4-4 to GD4-7.

<sup>38</sup> See the following Court decisions: *Mishibinijima*, 2007 FCA 36; *Pearson*, 2006 FCA 199; *Wasylska*, 2004 FCA 219; *Cooper*, 2003 FCA 389; *Marion*, 2002 FCA 185; and *Tucker*, A-381-85—GD4-4 to GD4-7.

- d) Given that alcohol use disorder is a disability and that there was no work-related behaviour in the Appellant's case (for example, drinking on work premises, missing work due to drinking), the analysis of his case has to take into account the principles governing the *Canadian Human Rights Act (An Act to extend the laws in Canada that proscribe discrimination)*.<sup>39</sup> He says that while this appeal isn't a challenge under this law, the Court addressed it in a decision involving misconduct.<sup>40</sup>
- e) "Alcohol use disorder" is a psychiatric diagnosis where sustained remission is 12 months.<sup>41</sup>
- f) The suspension of the Appellant's driver's licence is related to the application of section 29 of the *Highway Safety Code* (disorders related to the consumption of alcohol or other substances).<sup>42</sup>
- g) In the *Regulation respecting the health of drivers of the Highway Safety Code*, "Disorders related to the consumption of alcohol or other substances [*sic*]" (Division VII of the document) comes after "Psychiatric disorders" (Division VI of the document) and before "Illnesses and impairments of the nervous system" (Division VIII of the document).<sup>43</sup>
- h) The representative says that the Commission would not have found misconduct if, instead of alcohol use disorder, the medical diagnosis that caused a person to lose their driver's licence and their job had been another medical problem (for example, epilepsy, bipolar affective disorder, major depressive disorder, psychotic disorder).

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<sup>39</sup> See GD8-14 and GD8-15.

<sup>40</sup> See the Court's decision in *Mishibinijima*, 2007 FCA 36.

<sup>41</sup> See the excerpt from **the book entitled** *DSM-5 – Manuel diagnostique et statistique des troubles mentaux [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition]*—GD6-2 to GD6-10.

<sup>42</sup> See GD8-2, GD8-7, and GD8-8.

<sup>43</sup> See the document entitled *Regulation respecting the health of drivers*—GD8-3 to GD8-13.

- i) The Commission decided that the Appellant lost his job because of misconduct, without specifying the behaviour attributed to him, since there was no behaviour in his case, and he sought help dealing with his drinking problem.
- j) When the Appellant told his doctor about a health problem related to alcohol use disorder, all he wanted was help finding a solution to the problem.
- k) The Appellant's doctor didn't expect the driver's licence suspension, since the Appellant had taken charge of his recovery. His doctor made representations to have the SAAQ reverse its decision to suspend his driver's licence. In a document dated March 9, 2021, she said she didn't consider that the Appellant was exhibiting risky driving behaviour because, among other things: he had never driven or reported for work under the influence of alcohol, he had made remarkable efforts since starting medical treatment, he had no criminal record, and he had never gotten a ticket for dangerous driving.<sup>44</sup>
- l) In its arguments, the Commission talks a lot about the Appellant's behaviour in July 2021.<sup>45</sup> His two drinking relapses, in June 2021 and July 2021, contributed to his doctor's medical diagnosis.
- m) There is an error in the summary of an April 25, 2022, conversation between the Appellant and the Commission<sup>46</sup> that the latter refers to in its arguments.<sup>47</sup> In this summary, the Commission indicated, among other things, that the Appellant had asked for a new assessment in late June 2021 or early July 2021 to get his driver's licence back and had, as a result, been evaluated by an SAAQ assessor. The summary also indicates that the Appellant wasn't able to get it back because he had failed a breathalyzer (alcohol ignition interlock device) test in July 2021 and, as a result, had to go through the

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<sup>44</sup> See GD2-14.

<sup>45</sup> See GD4-6 and GD4-7.

<sup>46</sup> See GD3-31.

<sup>47</sup> See GD4-6 and GD4-7.

whole process again and had his licence revoked for 12 months as of July 2021. Which is incorrect.<sup>48</sup>

- n) The Appellant wanted to get his driver's licence back as of November 1, 2021, or at least two weeks before that so that he could be put on the recall list to work as a heavy truck and construction equipment driver and operator. This wasn't possible, not because of his behaviour, but because of an administrative delay on the SAAQ's part so that he could redo the six-month comprehensive assessment process to get his driver's licence back. After he applied to the SAAQ for a review on April 1, 2021, the earliest appointment he could get was on June 28, 2021. The six-month period as of June 28, 2021, extends beyond November 1, 2021, when the Appellant was to start working as a heavy truck and construction equipment driver and operator. The PERRCCA assessment report was submitted in January 2022.<sup>49</sup> Whether or not the Appellant successfully completed the process for getting his driver's licence back has no bearing in this case.
- o) To determine whether the misconduct could result in dismissal, there has to be a causal link between the claimant's misconduct and the loss of their job.<sup>50</sup> The representative says that in the Appellant's case, the causal link was broken, since he was able to continue working for the employer despite the driver's licence suspension. He went back to work as a road worker in early May 2021 despite the process he had begun to get his driver's licence back.
- p) The Court says that an objective assessment of the evidence is required to determine whether the author of the misconduct "could normally foresee that it would be likely to result in his or her dismissal."<sup>51</sup>

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<sup>48</sup> See GD3-31.

<sup>49</sup> See GD6-11 to GD6-13.

<sup>50</sup> See the Court's decision in *Lemire*, 2010 FCA 314.

<sup>51</sup> See the Court's decision in *Lemire*, 2010 FCA 314 at para 15.

- q) Based on the evidence, a reasonable person could not have believed that their driver's licence would be suspended for a year after telling their employer that they wanted help and after the employer told them that it was a good idea and suggested seeing a doctor to get the health care they needed.

[23] In this case, and based on the evidence, I find that the circumstances relating to the Appellant's dismissal don't show that he deliberately set himself up to lose his job. His dismissal isn't the result of a wilful act on his part.

[24] I find that the Appellant's driver's licence was suspended primarily because he had been diagnosed with alcohol use disorder, among other things. The diagnosis was the result of the steps he had taken with his family doctor to deal with his drinking problem after speaking with his employer.

[25] I note that the Appellant didn't commit any reprehensible act that led to the suspension of his driver's licence and, ultimately, to the termination of his employment as a heavy truck and construction equipment driver and operator.

[26] His evidence and his testimony and statements to the Commission don't show that the employer penalized him for his drinking.

[27] The statements from the employer and the documents it sent to the Commission don't show that the Appellant exhibited reprehensible behaviour in his job that was related to his drinking problem (for example, reporting for work under the influence of alcohol, drinking on the job, breaching the employer's alcohol or drug policy, refusing to get help with a drinking problem).

[28] The Court tells us that it isn't reasonable to find that a claimant lost their job because of misconduct when there is no evidence that they breached their employer's drug and alcohol policy.<sup>52</sup>

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<sup>52</sup> See the Court's decision in *Lepretre*, 2011 FCA 30.

[29] The evidence from the employer primarily shows that the Appellant could no longer work in his seasonal position as a heavy truck and construction equipment driver and operator, since his driver's licence was suspended.

[30] There is also no indication that the Appellant was arrested or the subject of an offence report or charges in connection with driving a road vehicle while impaired by alcohol, whether on or off the job.

[31] The Commission argues that according to case law, losing a driver's licence because of a substance use disorder amounts to misconduct under the Act.<sup>53</sup> But, the Court decisions it refers to in support of its arguments involve situations where a claimant exhibited reprehensible behaviour related to this problem (for example, absences from work due to drinking, reprehensible behaviour by an employee because they drank or took drugs on the job or because they were intoxicated for this reason, an employee's refusal to get help with a drinking problem), which isn't the case for the Appellant.<sup>54</sup>

[32] Since there is no evidence that the Appellant committed a reprehensible act related to the loss of his driver's licence, I don't accept the Commission's argument that his dismissal amounts to misconduct because, in its view, his actions are what led to the termination of his employment, since he knew he needed a driver's licence to do his job.<sup>55</sup>

[33] I find that the steps the Appellant took with his family doctor to deal with his drinking problem lack the mental element required to be considered misconduct under the Act, even if they led to the suspension of his driver's licence.

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<sup>53</sup> See GD4-4.

<sup>54</sup> See the following Court decisions: *Mishibinijima*, 2007 FCA 36; *Pearson*, 2006 FCA 199; *Wasylska*, 2004 FCA 219; *Cooper*, 2003 FCA 389; *Marion*, 2002 FCA 185; *Turgeon*, A-582-98; and *Tucker*, A-381-85—GD4-4 to GD4-7.

<sup>55</sup> See GD4-4.



[34] The Court tells us that if the necessary mental element is absent, the conduct complained of won't be characterized as misconduct under the Act.<sup>56</sup>

[35] The Commission also argues that even though the reason the Appellant lost his driver's licence isn't related to an offence under the *Highway Safety Code* or to non-compliance with the SAAQ's conditions, the consequence is that he no longer fulfilled one of the essential conditions of his employment to work as a heavy truck and construction equipment driver and operator, which means that there was misconduct under the Act.<sup>57</sup>

[36] Despite the Commission's argument on this point, I find that the Appellant didn't deliberately place himself in a situation where he could no longer fulfill the conditions of his employment.

[37] I find that the Appellant's inability to fulfill an essential condition of his employment isn't due to reprehensible behaviour on his part, related to his job. And it isn't related to an offence, charge, or conviction for alcohol-impaired driving.

[38] The Court also tells us that an inability to fulfill a condition of employment doesn't always amount to misconduct under the Act.<sup>58</sup>

[39] Even though the Appellant could no longer perform the duties of his job as a heavy truck and construction equipment driver and operator and the employer decided to let him go, I find that he didn't intend to lose his driver's licence. He didn't intentionally lose his job or cause his unemployment.

[40] I find that the Appellant could not have anticipated that he would lose his driver's licence the way he did. He could not have known that having his driver's licence suspended under those circumstances would cost him his job.

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<sup>56</sup> The Court established this principle in *Jewell*, A-236-94.

<sup>57</sup> See GD4-5.

<sup>58</sup> The Court established this principle in *Granstrom*, 2003 FCA 485.

[41] The Commission argues that despite his treatment and his ongoing follow-up as part of a program to help with his drinking, the Appellant admitted failing, in July 2021, a test on the breathalyzer he was using because he had drunk alcohol that month.<sup>59</sup> According to the Commission, he could have gotten his driver's licence back without Condition I, but because of his wilful behaviour, he wasn't able to get it back, since he had failed the test in question.<sup>60</sup> The Commission says that he didn't act like a reasonable person who wants to stay employed and that he disregarded the effect his behaviour would have on his job.<sup>61</sup>

[42] On these points, I accept the representative's explanation that the summary of an April 25, 2022, conversation between the Commission and the Appellant, which indicates that the latter's driver's licence was revoked for 12 months because, in July 2021, he had failed a test on the breathalyzer he was using, was incorrect.<sup>62</sup> I find that it is more likely than not that the summary of that conversation is incorrect on this point, since there is no documentary evidence that the Appellant's driver's licence was suspended for 12 months as of July 2021.

[43] I also accept the representative's explanation that it wasn't because of his behaviour that the Appellant was unable to get his driver's licence back and start his job as a heavy truck and construction equipment driver and operator in November 2021; it was because of the administrative delay on the SAAQ's part so that he could go through the six-month comprehensive assessment process as part of the PERRCCA. He points out that after the Appellant applied to the SAAQ for a review on April 1, 2021, the earliest appointment he could get as part of this process was on June 28, 2021.

[44] In summary, although the Appellant's driver's licence was suspended, the suspension isn't related to any acts on his part that were conscious, deliberate, or intentional and that can be considered misconduct.

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<sup>59</sup> See GD4-5.

<sup>60</sup> See GD4-5 and GD4-6.

<sup>61</sup> See GD4-5.

<sup>62</sup> See GD3-31.

[45] I find that the Appellant didn't consciously choose to ignore the standards of behaviour that the employer had a right to expect of him.

[46] In my view, the Appellant could not have known that his decision to take steps with his family doctor to deal with his drinking problem would get his driver's licence suspended and ultimately cost him his job as a heavy truck and construction equipment driver and operator.

[47] I find that the Commission hasn't proven that the Appellant intentionally lost his driver's licence and set himself up to deliberately lose his job.

[48] I am of the view that in this case, the Commission hasn't met its burden of proving whether the Appellant's act amounts to misconduct.

[49] The Court tells us that the Commission has to prove the existence of evidence showing a claimant's misconduct.<sup>63</sup>

[50] The Court also tells us that it must be established that the claimant was let go because of misconduct.<sup>64</sup>

[51] Although the Appellant lost his job because of the driver's licence suspension, his dismissal isn't the result of misconduct on his part.

[52] I find that the Appellant's dismissal isn't the result of an act he committed wilfully and deliberately.

[53] The reason for the Appellant's dismissal isn't related to misconduct under the Act.

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<sup>63</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>64</sup> The Court established or reiterated this principle in the following decisions: *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

## **Conclusion**

[54] The Commission hasn't shown that the Appellant lost his job because of misconduct.

[55] As a result, the Commission's decision to disqualify him from receiving EI regular benefits from October 31, 2021, isn't justified.

[56] This means that the appeal is allowed.

Normand Morin

Member, General Division – Employment Insurance Section